Concerned Citizens for Improved Quality Water

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An Inventory of the Miller-Bradley Legislation and SWRCB Decision 1630

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Two recent events have dramatically altered the inventory of water management circumstance in California. One, the adoption by the Congress and enactment of Public Law 102-575, (Miller-Bradley),and the action of the State Water Resources Control Board in Decision 1630.

The Miller-Bradley legislation substantially affects water issues previously catalogued by CCIQW on December 17, 1991, to the Governor's Task Force hearing at Redding. A copy of that report is attached. The importance of this legislation cannot be overstated, particularly when one recognizes the absolute control agriculture has exercised over water management since the entry of government in the development and management of the resource over seventy years ago, and the consequent difficulty in securing these significant changes.

To illustrate this plenary dominance by the example of California, the inventory includes:

1. The ability to prevent enactment and any legislation whatsoever to manage the underground aquifers of the Central San Joaquin Valley, thus allowing the continued mining of the resource to the point that consequent surface collapse has destroyed 16,000,000 acre feet of aquifer, lowering of land levels and destruction of surface improvements.

2. The power to preclude enforcement of the purposes of County of Origin legislation and the Delta Protection Act which were enacted as conditions to the State Water Project.

3. The influence to sequester the pristine headwaters of the San Joaquin River at Friant Dam for diversion south to arid Kern County to grow water-intensive crops of cotton, corn and alfalfa with the consequence, in part, that in 1975, the Central Valley Regional Water Quality Control Board classified the lower San Joaquin as a "water quality limited segment unfit for water contact recreation such as swimming or water skiing or protection of fish and wildlife."

4. The political capacity to secure federal price supports for water intensive crops--in one case, rice , double the world market price, to be grown in inappropriate arid California with consequent water loss relative to crops grown in areas of natural water availability.

5. The ability to prevent enactment or enforcement of even limited controls of use of toxic chemicals in agricultural production and waste their discharge to waterways.

6. The power to preclude prohibition of application of project water to areas of toxic mineral concentrations in the San Joaquin Valley. Without artificial water applications, these concentrations would not present any danger as they are essentially benign until project water is provided. By the resulting dissolving and transportation of the consequent toxic drain water to areas of downstream concentration such as Kesterson Reservoir, where these toxic minerals produce the environmental disaster to flyway and local wildlife.

   Interestingly enough, the response of agriculture to that disaster at Kesterson was not to terminate the application of project water to toxic concentrations, such as selenium, but to by-passs Kesterson and discharge the toxic effluent directly to the already moribund San Joaquin River.

7. State Water Project contractors, through subsidy of general funds and, specifically, tidelands oil revenues, and federal contractors through water pricing have been provided water far below delivery costs. This economic advantage, in turn, has provided the base for political control upon which, up to this point, has maintained the public subsidy.

8. With that capacity to avoid regulation and largely until the Miller-Bradley legislation, agricultural has been able to resist changes in that delivered water pricing. While the issue will be discussed in greater depth in the inventory of effects of Public Law 102-575, it is appropriate to point out that water transfers to any outlet, including those to CVP contractors, and to other uses, is permitted in this legislation.

While contract price terms are now reduced to twenty-five years, the problem still remains. As the price is fixed for that period and as demands for water increase with consequent rise in prices others are willing to pay, then a water right holder who obtained and paid nothing for that right on the claim of public benefit through agricultural production and enjoys a fixed price now for 25 years, is

empowered to sell that water for any use for any price obtainable at any time during the 25 years.

The alternative, reducing the permit allotment to that amount required for remaining agricultural production and the state receiving the income from the sale appears to be a more appropriate process, particularly in light of the economic reality that water permit holders may abandon their agricultural application for a greater income from sales for other uses, thus vitiating the purpose for which the original water right was obtained.

With that partial inventory of power, it becomes even more important to recognize the difficulties the Miller-Bradley legislation faced. Whatever the politics, whatever the compromises or accommodations to secure passage and avoidance of a veto.

Following is an inventory of that legislation and suggestions of what remains to be done.

1. Further assignments of unallocated available CVP water is prohibited until the SWRCB has finalized its present D1630 decision and the circumstances of water quality in the Delta provide for the fish and wildlife community established by the legislation. This may be long-term, particulary if D1630 is litigated as was D1485.

2. The issue presented by the present 40-year term CVP contract terms in which prices for delivered water remain firm for that period while costs of delivery increase, is met by the term reduction to twenty-five years, requiring all future contracts to comply with the purposes of PL 102-575 and increasing future contract prices absent renegotiation of the price structure of the present longer-term existing contracts.

3. Present CVP legislation prohibits transfers of contract water outside the contract community. PL102-575 permits a contractor to sell water anywhere in the State of California. This capacity to sell water assigned on the premise of need for agricultural production for profit to the people of California who own it in public trust is more fully discussed in the Redding paper of CCIQW.

4. That paper also addressed the issue of metering water consumption which CCIQW had argued before the Bureau at the Sacramento hearings to argue the point that meters be required as a condition to all new permits. This applied particularly to the City of Sacramento, which presently by charter prohibits metering. This provision of PL 102-575 requires such metering on all surface water deliveries.

5. The problem of discharge of agricultural toxics is responded to by the requirement that state and federal standards be met. This leaves the responsibility to establish such standards and for their enforcement. With current change in the leadership of the Senate Agriculture and Water Committee, the opportunity for more effective management of agricultural wastes will be presented, at least on a state level.

6. The standards for price structuring of CVP projects in part adopts an inclined price scale, but substantially increased delivered water costs are provided for.

7. The absolute, not relative, posture of fish, wildlife and habitat in priority of need is established and for the first time, it is made clear that the interpretation of the CVP Congressional authorization by Secretary Ickes is now a fixed element of project purposes. A specific allocation of 800,000 AFY is specifically provided for this purpose, 400,000AFY for the Trinity River and wildlife refuges and specific environmental goals are established including population doubling of salmon and other hydrophilous species, a requirement which will also benefit the Delta environment generally. Present environment degradation is to be mitigated by a fifty million dollar per year fund secured by additions to contract prices, and specifically allocated for this purpose.

8. The legislation also makes permanent the present tenuous MOU agreement between the state and federal governments as to the operations of their respective projects by requiring the CVP to comply with all California legislative and administrative controls.

9. The legislation deals specifically with federal involvement in water developments in other states not relevant to its specific effects in California.

10. Again, the importance of this legislation cannot be overstated. What its future may be in prospect of litigation by the agricultural community which up to 1992 has successfully thwarted any restraint or management of use of water, remains for the future.

What the legislation ultimately will produce also turns upon the enthusiasm of those who must administer it. The comment of John Todd, a Regional Director of the Bureau of Reclamation, may be prophetic: "The Bureau has been handed a monumental task of interpreting a poorly-written act." With that comment, the future remains, at best, uncertain.

The legislation remains, however, of historic importance, particularly when the origins of the law are recognized in the Delta Protection Act and County of origin Legislation generated by Senator Miller in conjunction with the Burns Porter Act and its State Water Project.

While the relationship of the enactment of PL 102-575 and the actions of the State Water Resources Control Board finally, in D1630, immediate thereafter is not yet certain, the dramatics of their conjunctive appearance heightens the potential for their synergistic composition.

As pointed out before, the Miller-Bradley legislation requires the compliance of CVP with state water regulation. As proposed, D1630 has similar goals and with more specific procedures.

The background of this decision is more fully discussed in the Redding paper of CCIQW. What its fate may be in light of the litigation and delays that followed its previous decisions remains to be seen. However, it, too, has historic dimensions in the changes it proposes. The following is an inventory of those proposed changes in water management in California.

Since the Racanelli decision of 1986, the SWRCB has interminably wallowed in the administrative process of purported compliance. One previous action was aborted to secure reappointment of its chairman. Hearings became a conventional fixture of the administration. Pressures of E.P.A. to provide for environmental protections in water export and management and the potential of PL 102-575 and its enactment absent the veto urged by Seymour and Wilson apparently were enough to provoke action by the SWRCB to provide consideration for the purposes of the Delta Protection Act and County of Origin Legislation, a responsibility that has not been discharged since its creation over thirty years ago.

The following is an inventory of the actions taken by the SWRCB in proposing D1630 that will effect the 64 state water contractors:

1. It formalizes the concept of water as an element within the concept of public trust as established in the Racanelli decision. That is, that this resource must be utilized and managed in the broad public interest.

2. It finally and incredibly recognizes that water export has been a primary factor in Delta environmental degradation.

3. It proposes to regulate and limit export to provide for maintenance and restoration of Delta environment.

4. As Central Delta water quality is required to be periodically improved, periods of improved quality will permit cessation of historic continuous

pumping by the Contra Costa Water District and its fishery impact in conjunction with the essential purpose of the Los Vaqueros Reservoir.

5. It establishes a modicum of recognition of the need for regulation of the Central San Joaquin underground aquifer.

6. State water contractors, in addition to water costs, will provide $60,000,000 per year by a $5-$10 fee in mitigation of environmental effects incident to export.

7. It recognizes the failure of its previous D1485 to include all water diverters in a water management program and complies with the Racanelli decision. While recognizing the Racanelli decision requirement to include all diversions to share in water management regulation, it limits those responsibility to other than state and federal support projects and to "pulse flows." The question of whether this meets the Racanelli intent remains.

8. It acknowledges the state constitutional and legislative establishment of "Beneficial Use" to be broader than immediate economic use and include the public interest in environmental protection.

9. It prohibits use of surface supplies for flushing of salts to deeper soils to avoid root areas.

10. It initiates a time sequence of export pumping to minimize fishery loss. The consequent restraint is estimated to be 800,000 AFY or 15% of export, depending upon yearly precipitation. The projected range being 800,000 to 1,000,000 AFY.

    Reductions in water deliveries for export will depend upon water available from annual storage capacities and precipitation. The average will be 570,000 AFY for CVP and 230,000 AFY for the SWP. The reductions established for CVP export will offset, in part, the 800,000 AFY provided for in the federal legislation.

11. As PL 102-565, it requires water metering, a circumstance more fully described in the CCIQW Redding presentation. Similarly, the water transfer proposal of Miller-Bradley are incorporated in D1630 leaving again the circumstance that a water permittee securing that permit on the basis of use for the public good can terminate that use and sell the water to the highest bidder, water that originally and by the Racanelli decision belonged and belongs to the people, thus encouraging abandonment of agricultural production to secure higher net revenues from sale for other purposes.

There has always been a residual conflict between the two agencies. The Bureau, in the Spencer mandate of 1955, refused to cooperate with the state in water quality maintenance by declaring its obligation to be limited to providing water quality only at the export pumping facilities at Tracy. The Bureau was the first and primary litigant to set aside the 1978 decision of the SWRCB to establish even the modicum of quality standards proposed by that Board. Only by Congressional mandate of cooperation and the obligation to observe state regulation has some semblance of common purpose been achieved.

But the state goal has consistently remained to secure the return of the adopted child to the family from which it sprang. With recent and unproductive threats by the federal Environmental Protection Agency to establish operational standards for both projects in the broad environmental and public interest,. the efforts to secure transfer have been intensified.

To avoid the conditions of PL 102-575 and the possibility of additional regulation in the future, activity to eliminate the federal government from control of water management in California has become a monomania. The potential for such transfer has serious implications for Contra Costa County and the Delta.

Central to the Central Valley Project was the fundamental purpose of agricultural development. Project use for industrial or domestic purposes was specifically excluded. When the Central Valley Project legislation was in the process of adoption by the Congress, the Contra Costa Canal was included in project purposes as an agricultural facility, while in fact the central county farming community resisted the proposal as water tables were already at higher than root zone levels and higher elevation crops such as the vineyards near Martinez could not utilize the water.

The canal, while secured upon representations of need for agriculture which never needed or used the canal, was in fact built to provide water for the industrial plants in the county which were experiencing diminishing water quality off-shore as increasing upstream diversions were reducing Delta outflow and tidal incursions progressed further upstream past Oleum, Port Chicago, Martinez, Pittsburg and Antioch.

As the federal government could not operate the canal facility for industrial or domestic use, the Contra Costa Water District was formed to provide this management in a dramatically changing circumstance of need for increasing deliveries of water for domestic and industrial purposes.

The Contra Costa Water District, as an operating facility, has no right to water by permit or otherwise except for its contract with the Bureau of Reclamation which contains no condition for quality.

12. While the responsibly of diverters other than SWP and CVP contractors established in the Racanelli decision is recognized, that responsibility is limited to so-called pulse-flow discharges during period of specific environmental need and is further quantified from 400,000 AF to 1.2 AF, depending upon reservoir retentions and precipitation.

The fate of D1630 vs D1485 remains uncertain. To some extent, it potentially improves Delta water quality and hopefully maintains what little remains of its historic environment.

Whether litigation will follow and delay its implementation as occurred in D1485 remains uncertain. Whether the present administration, which opposed PL 102-565, will join in its conjunctive implementation with D1630 remains uncertain as well.

The SWRCB obviously utterly failed to project the restoration of the historic Delta environment. What it will do and what administrations on both the state and federal level will do to implement the meager standards of D1630 or the broad concepts of PL102-575 remains as well for the future.

What must be keep in mind, however, is that Public Law 102-565 was adopted in an obvious political cauldron and was successful by reason of the advantages provided to, for example, Utah, Colorado and Arizona.

When the projects of those states are funded, the long-term question then remains, will the states that supported the purposes of the Miller legislation to obtain the advantages for themselves remain to permanently support those programs in California?

The long term potential of PL 102-575 is uncertain as well in the continuing effort of the Wilson administration to transfer the Central Valley Project to the State of California.

While this proposal is by no means recent in origin, it is now intensified by the creation of a team in the Department of Water Resources specifically directed t cooperate with the Bureau of Reclamation to present to the Congress as quickly as possible an agreement for the transfer of the CVP to the State of California, an assignment that would terminate the effects of the Miller-Bradley legislation so fa as it relates to California.

The Central Valley Project was originally a State of California water projec Unable to finance the construction costs during the financial limitations of the intervening national depression, the state transferred project to the Roosevelt administration which was searching for large construction activities to trigger a recovery through creation of jobs.

of water resources such as the continuing destruction of the invaluable Central San Joaquin underground water resource?

More important, will D1630 or other controls be enacted as a statutorily mandated regulatory mechanism to avoid the uncertainties of administrative impotency of the State Water Resources Control Board whose delays and politically dictated decisions have created the problems it was established by the Legislature to prevent?

Or, will the charade of regulation by the SWRCB through meaningless and unproductive hearings with no regulations actually in place and interminable appeals from ambiguous regulations that periodically emerge from the morass of constant"hearings" and staff reports that are thwarted by political pressures and litigation now produce any serious change?

At least the potential for change has been added. PL 102-565 and D1630 are center stage for their Oscar or the oblivion of all previous suggestion of serious regulation of the resource water in California.

Absent any independent water right, if the CVP should be transferred to the State of California, the District becomes a pawn in the state political agenda. Thus, as Public Law 102-575 becomes the magnet for collection of efforts to eliminate the federal government from California water management, it creates as well speculations as to its final effects upon the volatile political maelstrom of water control in California and for Contra Costa County.

The permutations of any change in water circumstance in California are endless. One, however, like Scipio's Ghost, permeates even the minutia of change--The Peripheral Canal.

The present synthesis of both D1630 and Public Law 102-565 certainly invites attention to this constant visitor to all discussions of water management, for every recent discussion of either subject makes reference to the Canal or its new image, a cross-Delta transfer facility.

It will be remembered that during the debates on the Peripheral Canal in Proposition 9, the principal argument given in its favor was the claim that 1,000,000 acre feet per year would be "saved" by a transfer around, not through, the Delta, eliminating the need to provide that amount of water for carriage water and salt water repulsion. While this "saving," at the expense of the Delta environment, may have been realized, the result, absent the hydraulic barrier, would have been the consequent entry of salt water from San Francisco Bay and reduction of fresh water inflow into the Delta, and its inevitable environmental degradation.

Considering the proposed requirements for improvement in water quality and fish and wildlife in both Miller-Bradley and Decision 1630, together with the reductions in export required to provide the water now assigned for these purposes, obviously, the ghost of the canal will haunt the legislative halls and administrative decision process immediately, and with renewed enthusiasm. The argument now provoked by the new environmental maintenance requirements will be that the water so removed from export can be replaced by the purported "saving" of carriage and salt water repulsion discharges of a peripheral canal.

So solutions to problems create new problems, just as remedies of the past created the problems of today. Will the minimal environmental accommodations of D1630 be realized? Will D1630 as was D1485 be litigated and delay or emasculate its enforcement? Will pressure to eliminate federal regulation be increased in order to transfer the Central Valley Project to California and avoid federal management? Will the Environmental Protection Agency controls remain if the Central Valley Project is transferred to California? Will any significant management be initiated in the State Legislature to establish joint regulations beyond the present joint agreement between DWR and the Bureau of Reclamation should that transfer occur or will the Legislature even remedy the obviously inadequate present management